

No. 49149-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

CORY DANIEL REED,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

---

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

The State did not prove beyond a reasonable doubt that Cory Reed was armed with a deadly weapon for purposes of the deadly weapon special verdict. Viewed in the light most favorable to the State, the evidence shows only that Reed was holding a bat in his hand during a robbery. He did not swing the bat or hit anyone with it. He did not *actually use* the bat in a manner likely to produce death or that could easily and readily produce death. Thus, the deadly weapon enhancement must be vacated.

In addition, Reed must be resentenced because the State did not prove the prior convictions the court relied upon to calculate the offender score.

B. ASSIGNMENTS OF ERROR

1. The State did not prove the deadly weapon enhancement allegation beyond a reasonable doubt.

2. The State did not prove Reed's prior convictions for purposes of calculating the offender score.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A bat is not a per se deadly weapon under the deadly weapon enhancement statute. Thus, where the State seeks a deadly weapon

enhancement based upon the use of a bat, it must prove the bat was *actually used* in a manner likely to produce or that could easily and readily produce death. Here, the complaining witness testified that Reed held a bat in his hand during a robbery. At most, this establishes an implied threat to use the bat. No evidence establishes that Reed *actually used* the bat in a manner likely to produce death. Did the State fail to prove the deadly weapon enhancement allegation beyond a reasonable doubt?

2. Constitutional due process and the Sentencing Reform Act (SRA) require the State to prove a defendant's criminal history at sentencing. The State must do more than present a list of the defendant's prior convictions it believes to exist. Here, the State presented a list of prior convictions it believed to exist but produced no evidence to prove them. Did the State fail to meet its burden in violation of constitutional due process and the SRA?

#### D. STATEMENT OF THE CASE

Cory Reed is 29 years old and lives in Longview. RP 258. In January 2016, someone attacked him with a knife. RP 261-62. Reed was seriously injured. RP 262. As a result of the attack, he became

concerned for his safety. RP 262. He started carrying a bat for his protection, especially at night. RP 218, 263.

Reed's grandmother collected Elvis memorabilia and had a room full of Elvis collectables. RP 245. Also, his great-grandfather had a coin collection. RP 245. Reed inherited some of his grandmother's Elvis memorabilia and his great-grandfather's coins when they died. RP 245, 259-61.

On the night of February 17, 2016, Reed was carrying his baseball bat for protection as usual. RP 264. He carried the bat in his pocket. RP 219, 230, 264. He also had two Elvis coins in his pocket, which he had inherited. RP 259-60.

That night at around midnight, Reed was out walking with his girlfriend Ashley Leonard and two of her friends. RP 215-16, 268. Reed saw an acquaintance, David Bonilla, on the other side of the street. RP 265. Bonilla was walking home from his job at a nearby grocery store. RP 127. Bonilla's brother-in-law Alex was one of Reed's best friends. RP 266. Reed wanted to know where Alex was because Alex owed Reed money. RP 266. Reed crossed the street to talk to Bonilla. RP 265. Reed asked Bonilla for a cigarette and if he knew where Alex was. RP 266.

According to Bonilla, Reed crossed the street and approached him “with the bat in his hand.” RP 134-35. He said Reed asked him if he had any money. RP 136. When Bonilla told him he had no money, Reed said, “well, let me find out,” and “put his hand right in my pocket.” RP 136. Bonilla asked Reed what he was doing and Reed said, “This is a robbery in progress.” RP 138. According to Bonilla, Reed held the bat out with one hand as he stuck his hand in Bonilla’s pocket with the other hand. RP 138.

Bonilla said he had two Elvis coins in his back pocket. RP 138. He said his co-worker had given him the coins that night. RP 120-21, 127. Bonilla said Reed took the coins out of his pocket. RP 139.

Bonilla admitted Reed never swung the bat at him or tried to hit him with it. RP 147.

Bonilla ran to a nearby house and knocked on the door. RP 142-43. A man answered and let Bonilla use his telephone to call 911. RP 145.

Police officers arrived and stopped Reed and the others in the group. RP 162. Reed’s bat was in his back pocket. RP 162. A police officer also found two Elvis coins in his pocket. RP 167. Reed said he



did not know what the officers were talking about when they said they were responding to a call about a robbery. RP 170.

Reed was charged with one count of first degree robbery while displaying what appeared to be a deadly weapon, specifically, a bat. CP 54. The information also alleged Reed was “armed with a deadly weapon other than a firearm.” CP 54.

The jury found Reed guilty of first degree robbery. CP 36. The jury also answered “yes” on the special verdict form, finding he was armed with a deadly weapon at the time of the crime. CP 35.

At sentencing, the State alleged Reed had four prior convictions that should be included in his offender score. CP 59. The State submitted a document listing four prior alleged convictions. CP 59. But the State submitted no documents or other evidence to prove the alleged convictions. Defense counsel did not affirmatively agree with the State’s assertions regarding Reed’s criminal history.

The court relied on the State’s unsupported allegations and calculated Reed’s offender score as a five. CP 22. The court imposed a standard-range sentence plus a 24-month deadly weapon enhancement. CP 20, 24.

E. ARGUMENT

**1. The deadly weapon enhancement must be vacated because the State did not prove Reed used a bat in a manner likely to produce or that could easily and readily produce death.**

According to the State's evidence, Reed held a bat in his hand as he took property from Bonilla. RP 134-35, 138, 147. Reed did not swing the bat or utilize it in any way that caused or could cause injury to Bonilla. To receive a deadly weapon enhancement, the State was required to prove the actual use of the bat in a manner that could readily produce death. Thus, the evidence is insufficient to prove the elements of the deadly weapon enhancement beyond a reasonable doubt.

*a. The State was required to prove Reed used the bat in a manner likely to produce or that could easily and readily produce death.*

The SRA authorizes the court to add two years to a person's sentence if the State proves he was "armed with a deadly weapon other than a firearm." RCW 9.94A.533(4)(a). Constitutional due process and the constitutional right to a jury trial require the State to prove a deadly weapon enhancement allegation to the jury beyond a reasonable

doubt. State v. Williams-Walker, 167 Wn.2d 889, 897, 225 P.3d 913 (2010); Const. art. I, §§ 21, 22; U.S. Const. amends. VI, XIV.

Whether a person is armed with a deadly weapon for purposes of the statute is a mixed question of law and fact. State v. Schelin, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002). The question here is whether the State's evidence is sufficient, as a matter of law, to prove that Reed was armed with a "deadly weapon." Id.

The statute defines two types of deadly weapons: those that are deadly per se, and those that are deadly in fact, based upon the circumstances of their use. State v. Thompson, 88 Wn.2d 546, 548-49, 564 P.2d 323 (1977). The statute provides:

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825.

The specific instruments listed are those deemed deadly per se. Thompson, 88 Wn.2d at 548-49. The Legislature considered them to

be “so inherently dangerous that they should be termed ‘deadly’ regardless of the circumstances of their use.” Id. at 549. When a weapon is deadly per se, the State need prove only that the defendant was “armed” with the weapon, that is, that the “weapon was easily accessible and readily available for use and that there was a nexus or connection between the defendant, the crime, and the weapon.” State v. Eckenrode, 159 Wn.2d 488, 490-91, 150 P.3d 1116 (2007).

If the instrument involved is not deadly per se, the State must prove both that the defendant was armed with the instrument, and also that it was deadly in fact. An instrument is deadly in fact if it “has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” RCW 9.94A.825.

A baseball bat is not one of the instruments listed in the statute as deadly per se. See RCW 9.94A.825. It would be far-fetched to treat a baseball bat as a per se deadly weapon, given its ubiquity at Little League games and in other contexts. Thus, the State must prove a bat is deadly in fact. The jury was instructed it must find Reed was armed with an instrument that “has the capacity to inflict death and from the

manner in which it is used, is likely to produce or may easily and readily produce death.” CP 52-53.

The character of an implement as deadly in fact “is determined by its capacity to inflict death or injury, and its use as a deadly weapon by the surrounding circumstances.” Thompson, 88 Wn.2d at 548-49. Relevant circumstances include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” Id.

In Thompson, the defendant was armed with an instrument that was deadly in fact based upon the circumstances of its use. Thompson held an open pocketknife, with a blade between two and three inches in length (smaller than a per se knife’s required length), against the neck of a woman while demanding she turn over the money in her possession. Thompson, 88 Wn.2d at 550. During the robbery, she sustained a cut on her neck and bruises on her arm. Id. The court concluded that holding a knife blade against a person’s neck and causing an actual injury is sufficient to establish the knife was used in a manner readily capable of causing death. Id.

Similarly, in State v. Pomeroy, the defendant deliberately broke a beer glass and thrust the broken glass into a person’s face. 18 Wn.

App. 837, 843-44, 573 P.2d 805 (1977). One of the victim's eyes had to be removed as a result of the blow. Under those circumstances, the broken glass was used in a manner rendering it deadly in fact. Id.

These cases and the language of the statute establish that the instrument must have the capacity to inflict death, and the defendant must *actually use* the instrument in a manner likely to produce or readily capable of producing that result. It is not enough if the defendant merely *threatens to use* the instrument.

*b. The plain language of the statute demonstrates the Legislature intended that the State prove the defendant actually used the implement in a manner easily and readily capable of causing death and did not merely threaten to use it.*

The plain language of the deadly weapon enhancement statute and related provisions demonstrates the Legislature intended to require the State to prove the defendant actually used and did not merely threaten to use a deadly weapon before a court may add two years to a person's sentence.

In applying the deadly weapon enhancement statute, the Court's objective is to give effect to the Legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The surest indication of legislative intent is the language enacted by the Legislature, so if the

meaning of a statute is plain on its face, the Court gives effect to that plain meaning. Id. In determining the plain meaning of a provision, the Court looks “to the text of the statutory provision in question, as well as ‘the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’” Id. (quoting Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). An undefined term is “given its plain and ordinary meaning unless a contrary legislative intent is indicated.” Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998).

As a penal statute, the SRA must be construed strictly and may not be extended by construction to situations not clearly intended by the Legislature. Blanchard Co. v. Ward, 124 Wash. 204, 207, 213 P. 929 (1923). If the statute is ambiguous, under the rule of lenity, the Court must adopt the interpretation that favors the defendant. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. Campbell & Gwinn, 146 Wn.2d at 12.

The proper interpretation and application of the statute is a question of law reviewed *de novo*. Ervin, 169 Wn.2d at 820.

The statute provides that when a person is armed with an instrument that is not deadly per se, the State must prove the instrument “has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” RCW 9A.04.025.

The elements of the deadly weapon enhancement statute are different from related provisions of the criminal code. For example, the first degree robbery statute requires proof only that the defendant displayed what *appeared to be* a deadly weapon.<sup>1</sup> By contrast, the deadly weapon enhancement statute requires proof of “the presence of a deadly weapon in fact.” State v. Tongate, 93 Wn.2d 751, 755-56, 613 P.2d 121 (1980).

Similarly, the definition of “deadly weapon” under the criminal code is broader than under the SRA. The criminal code defines “deadly weapon” as any instrument that “under the circumstances in which it is used, *attempted to be used*, or *threatened to be used*, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6) (emphases added).

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<sup>1</sup> The first degree robbery statute provides a person commits the offense if he or she “[d]isplays what appears to be a . . . deadly weapon” in the commission of a robbery or in immediate flight therefrom. RCW 9A.56.200(1)(a)(ii); CP 50 (to-convict instruction).



By contrast, the deadly weapon enhancement statute requires proof that the instrument is actually “used” in a manner that “is likely to produce or may easily and readily produce death.” RCW 9.94A.825.

Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. State v. Delgado, 148 Wn.2d 723, 728-29, 63 P.3d 792 (2002). If language is included in one provision but excluded from a related provision, the Court presumes the exclusion was intentional. Id.

Under that doctrine, this Court must presume the Legislature’s decision to include “attempted to be used” and “threatened to be used” in the definitional provision of the criminal code but not in the deadly weapon enhancement provision of the SRA was deliberate. Clearly, the Legislature knew how to indicate that an instrument can be deemed deadly even if it is not used but only threatened to be used in a deadly manner. Yet the Legislature chose not to include such language in the deadly weapon enhancement statute.

Before a court may impose a deadly weapon enhancement based upon the use of an implement that is not deadly per se, the State must prove the defendant actually used the implement in a manner likely to

produce or that may easily and readily produce death, and did not merely threaten to use it.

*c. The State did not prove beyond a reasonable doubt that Reed actually used a weapon that was deadly in fact.*

The State did not prove Reed actually used a deadly weapon in fact because it did not prove he did more than display a bat during a robbery. Bonilla testified Reed held a bat in his hand as he took property from his pocket. RP 134-35, 138, 147. Bonilla admitted Reed never swung the bat at him or tried to hit him with it. RP 147. Bonilla was not injured in any way.

The State's evidence proves only that Reed threatened to use the bat. He did not actually use it in a manner that is "likely to produce or may easily and readily produce death." RCW 9.94A.825. The evidence is insufficient as a matter of law. The deadly weapon enhancement must be vacated.

**2. The State did not prove the prior criminal convictions relied upon to calculate Reed's offender score.**

Reed must be resentenced because the State presented no evidence to prove its allegations regarding his criminal history.

In Washington, a sentencing court's calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which is a list of his prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525.

Constitutional due process requires the State to prove prior convictions by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); RCW 9.94A.530(2); U.S. Const. amend. XIV. The State bears the burden of proving not only the existence of prior convictions, but also any facts necessary to determine whether the prior convictions may be included in the offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 480.

Despite its general reluctance to address issues not preserved in the trial court, our supreme court "allow[s] belated challenges to criminal history relied upon by a sentencing court." State v. Mendoza, 165 Wn.2d 913, 919-20, 920, 205 P.3d 113 (2009) (citing Ford, 137 Wn.2d at 477-78). The purpose is to preserve the sentencing laws, bring sentences in conformity and compliance with existing sentencing

statutes, and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Mendoza, 165 Wn.2d at 920.

The SRA must be interpreted in accordance with principles of due process. State v. Hunley, 175 Wn.2d 901, 913-15, 287 P.3d 584 (2012); Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 482. For a sentence to comport with due process, the facts relied upon by the trial court must have some evidentiary basis in the record. Mendoza, 165 Wn.2d at 926; Ford, 137 Wn.2d at 481-82. “It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.” Mendoza, 165 Wn.2d at 926 (citing Ford, 137 Wn.2d at 480).

The SRA expressly places this burden on the State because it is “inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.” Ford, 137 Wn.2d at 480 (citation omitted). When the State fails to meet its burden of proof, the defendant may challenge the offender score for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85.

The State bears the burden to produce evidence of a defendant's criminal history even if the defendant does not object. Mendoza, 165 Wn.2d at 928. The State is excused from producing evidence only where there is "an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing." Id. (emphasis in Mendoza); RCW 9.94A.530(2).

In Hunley, at sentencing, the State presented a written statement of the prosecuting attorney, summarizing its understanding of Hunley's criminal history. 175 Wn.2d at 905. It was an unsworn document listing Hunley's alleged prior convictions but was not accompanied by any documentation of the alleged offenses. Id. Hunley neither disputed nor affirmatively agreed with the prosecutor's summary. Id. The trial court calculated the offender score based upon the prosecutor's summary and Hunley did not challenge the offender score or the sentence in the trial court. Id.

The Supreme Court reversed the sentence. Id. at 915-16. Hunley's alleged prior convictions were established solely on the prosecutor's summary assertion of the offenses. Id. Because the prosecutor did not present any evidence documenting the alleged convictions, and Hunley never affirmatively acknowledged the

prosecutor's assertions regarding his criminal history, the resulting sentence violated constitutional due process. Id. at 913-15. Hunley was entitled to be resentenced following a hearing at which the State was required to prove the prior convictions unless affirmatively acknowledged by Hunley. Id. at 915-16.

This case is indistinguishable from Hunley. As in Hunley, to satisfy its burden to prove Reed's criminal history, the State presented only a summary list of his alleged prior convictions. CP 59. The State presented no evidence documenting the alleged convictions. Reed never affirmatively acknowledged the prosecutor's assertions regarding his criminal history.

Therefore, Reed's sentence violated constitutional due process and the SRA. Hunley, 175 Wn.2d at 913-15. Reed is entitled to be resentenced following a hearing at which the State must prove the prior convictions unless affirmatively acknowledged by Reed. Id. at 915-16.

#### F. CONCLUSION

The State did not prove Reed used a deadly weapon in fact. Therefore, the deadly weapon enhancement must be vacated. Also, Reed must be resentenced because the State did not prove its allegations regarding his criminal history.

If the State substantially prevails in this appeal, the Court should exercise its discretion and decline to award appellate costs due to Reed's indigency.

Respectfully submitted this 27th day of December, 2016.

/s/ Maureen M. Cyr

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

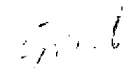
STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 49149-4-II
v.	)	
	)	
CORY REED,	)	
	)	
APPELLANT.	)	

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# WASHINGTON APPELLATE PROJECT

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